# ANDREW MARSHALL, JR. v. U.S. General Accounting Office

**Docket No. 92-04**

**Date of Decision: January 19, 1993**

**Cite as: Marshall v. GAO, Docket No. 92-04 (1/19/93)**

**Before: Alan S. Rosenthal, Administrative Judge**

**Headnotes:**

**Evidence**

**Motions Practice**

**Hearing Procedures – Pre/Post Hearing**

**Timeliness, General**

**ORDER**

PERSONNEL APPEALS BOARD
U.S. GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C.

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| Andrew Marshall, Jr., | ) | |
| Petitioner, | ) | Docket No. 92-04 |
| v. | ) | |
| United States General Accounting Office, | ) | |
| Respondent. | ) | |

ORDER

1. The Board has determined that oral argument is warranted on the assertions of the respondent in its post-hearing brief (at pp. 34-47) that certain of the petitioner's allegations must be dismissed on procedural grounds. Accordingly, oral argument strictly confined to those procedural assertions will be heard at 9:30 a.m. on Friday, February 5, 1993 in the Board's hearing room in Suite 830, 820 First Street, N.E., Washington, D.C. Each side will have forty-five minutes for the presentation of its argument. Having raised the issues to be considered, the respondent will be heard first and may reserve no more than ten minutes of its time for rebuttal, which shall be confined to a response to the claims advanced by the petitioner during his argument.

In preparing for argument, counsel may assume that the Board will be fully familiar with so much of the content of the briefs on file as relates to the procedural issues. In this connection, the Board may specify certain issues on which it will expect counsel to be especially well-prepared. Any such specification will be provided counsel no later than February 1.

Unless the Clerk of the Board is notified in writing to the contrary no later than February 1, it will be presumed that the argument on behalf of each party will be presented by the same counsel who represented that party at the evidentiary hearing.

2. Attached to petitioner's reply brief were three documents identified as petitioner's reply exhibits nos. 1, 2 and 3, respectively. Petitioner asks (Reply Br. at 1) that the Board take judicial notice of them "in accordance with 4 C.F.R. § 28.69." He also maintains (ibid.) that the Board's November 17, 1992 order left the hearing record open until January 15, 1993. For this proposition, he refers to 4 C.F.R. § 28.62(a).

One of the three documents (identified as reply exhibit no. 3) is the February 22, 1991 right to appeal letter sent to petitioner by the Board's General Counsel. A copy of that letter was routinely furnished to the Clerk of the Board (as well as to respondent's counsel). Accordingly, it is already in the official Board file pertaining to this proceeding and its authenticity appears to be beyond question. As such, it could be referred to by the parties without formal introduction into the evidentiary record.

The situation is quite different, however, with respect to the other two documents, which purport to be an exchange of correspondence in November-December, 1990 between petitioner and the Director of respondent's Civil Rights Office. Manifestly, this correspondence does not meet the section 28.69 standard for taking judicial notice "of [factual] matters of common knowledge or matters that can be verified."[1] And petitioner obviously has misinterpreted the proviso in section 28.62(a) of the Board's Rules of Practice to the effect that:

> [W]hen the administrative judge allows the parties to submit argument, briefs, <u>or</u> documents previously identified for introduction into evidence, the record shall be left open for such time as the administrative judge grants <u>for that purpose</u>.

[Emphasis supplied]. In its November 17, 1992 order, the Board sanctioned only the filing of post-hearing briefs and reply briefs, the latter to be due on January 15, 1993. That being so, section 28.69 operated to leave the record open solely for the purpose of the receipt of those briefs. The section simply cannot be read as giving to the November 17 order the additional effect of opening the door to the submission of further

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[1]The second prong of that standard undoubtedly was a shorthand adoption of the second prong of the Federal Rule of Evidence (Rule 201(b)) concerned with the kinds of adjudicative facts subject to judicial notice: "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." It is not open to serious suggestion that, as matters now stand, such sources are readily available to the Board; to the contrary, as in the case of any other similar document, petitioner had the burden of proper sponsorship of these documents, a burden hardly met by simply appending them to a brief and labeling them reply exhibits.

evidentiary material that both could and should have been introduced into evidence at the hearing (following proper authentication).

For the above reason, petitioner's reply exhibits nos. 1 and 2 are rejected without prejudice to the submission of a formal motion seeking their admission into the record. Any such motion shall (1) be filed and personally served by January 26, 1993; (2) explain the failure to have offered the exhibits during the evidentiary hearing last November; and (3) be accompanied by a representation of the respondent's express acknowledgement of their authenticity (or some other proof thereof).

SO ORDERED.

/s/
Alan S. Rosenthal
Administrative Judge

Date: January 19, 1993